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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., A CORPORATION, *Appellant,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS INC., AND YELLOW FREIGHT SYSTEM, INC. (SUCCESSOR TO WATSON-WILSON TRANSPORTATION CO., INC.), *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM.

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Appellees move the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Rule 16(1)(c) authorizes filing a Motion to Affirm the judgment sought to be reviewed on appeal from a Federal Court for the above-stated cause.

NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED BY APPELLANT.

Rule 15(1)(f) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." While Appellant at pages 3-4 of its Jurisdictional Statement alleges eight questions, its argument indicating why plenary consideration is necessary, consists of five numbered, frequently overlapping and repetitive, arguments, all of which were presented and argued in detail by appellant and rejected by the District Court.

Appellant's first argument misconstrues the meaning and relationship of Sections 203(a)(15) and 209(b) of the Interstate Commerce Act (49 U. S. C. Section 303(a)(15) and 49 U. S. C. Section 309(b), respectively). It is clear from Appellant's statement that it is arguing that once it has established by the evidence that it is proposing to assign motor vehicles to the exclusive use of the shipper, the issue of whether or not the proposed service is designed to meet a "distinct need" of the shipper is no longer material or relevant (Appellant's Statement, pages 12-14). In effect, the Appellant is saying that the issue of the "distinct need" of the shipper involved is not an element included in the criteria provided under Section 209(b) of the Act. The Appellant is obviously misguided in this regard.

As stated in the often cited case of *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, 386 U. S. 81 (1960), at page 88:

> "It seems clear from these provisions that the adequacy of existing service is a criterion to be considered by the Commission, as it is instructed to consider 'the effect which granting the permit would have upon the

> services of the protesting carriers,' as well as the effect of a denial upon the shippers. Or to put the matter otherwise, the question of the need of the shipping public for the proposed service necessarily includes the question whether the extent, nature, character, and suitability of existing, available service makes the proposed service out of line with the requirements of the national transportation policy. But the adequacy of existing facilities or the willingness or ability of existing carriers to render the new service is not determinative. The 'effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements' has additional relevance. This is a phase of the problem reflected in the broadened definition of 'a contract carrier by motor vehicle'—one who furnishes transportation services 'designed to meet the distinct need of each individual customer.' Section 203(a)(15). *It means, we think, that the 'distinct need' of shippers for the new contract carrier service must be weighed against the adequacy of existing services.*" (Emphasis added.)

It is obvious from the Report and Orders of the Commission that its consideration of the "distinct needs" of the shipper was related to its consideration and balancing of all the criteria under Section 309(b), in its effort to reach a determination whether the issuance of the permit would be consistent with the public interest and the national transportation policy. This is consistent with the holding in the *J-T* case.

Appellant also appears to attach some significance to that portion of the District Court Order which indicated that the Review Board in its Decision and Order considered the application to be for one shipper whereas the Appellant did not amend its application to delete its request to serve the second shipper until after the Board's decision. This inadvertent error in the Court's factual

recitation is of no moment, for the essential fact dealt with by the Court and the basis on which the Court decided the appeal was that Appellant sought to serve a single shipper.

Nor can there be any doubt but that the Commission gave full consideration to the shipper Hoffman's needs as well as those of the shipper Wilsey-Bennett whom Appellant subsequently amended out of the application. In fact, the Examiner devoted a full page to the discussion of each of the shippers' testimony and his findings clearly take note of the individual needs and desires of both the shipper Wilsey-Bennett and the Shipper Hoffman. After discussing these needs, the Examiner stated:

> "*Neither* shipper has shown any particular familiarity with the service afforded by existing carriers and *Hoffman* appears to have made virtually no effort to utilize those services." (Exhibit B to Statement, page 31, Emphasis added.)

Appellant's argument as to the importance to be attached to the fact that it proposes to serve a single shipper is contradictory. It argues, and subsequently repeats the same argument, that, on the one hand, the Commission gave undue consideration and emphasis to certain of the Section 309(b) criteria and that such undue consideration and emphasis is repugnant to the *J-T* case. On the other hand, however, the appellant then argues that since it will serve but one shipper, it has made the strongest possible showing for contract carrier authority. Appellant would have the Commission give undue consideration and emphasis to the first criteria in Section 309(b) while condemning the Commission's alleged undue consideration and emphasis on other criteria in Section 309(b). Obviously, the argument is inconsistent and fails to acknowledge that the Commission's function in determining applications under the Section 309(b) criteria is to balance all factors effect-

ing the listed criteria without giving undue preference to any.

In its second argument, Appellant invokes the due process clause of the Fifth Amendment to the U. S. Constitution (Statement, pages 14-16). No case is cited to support Appellant's position that the application of 49 U. S. C. 309(b) as construed and applied herein is repugnant to the due process clause. The argument overlaps, to a considerable extent, the first argument presented in the Statement. It is Appellant's position that the Commission's decision, and that of the District Court by adoption of the Commission's decision, was arbitrary, discriminatory and unlawful and, therefore, a denial of due process because Appellant was allegedly required to establish inadequacy of existing services as well as proof of service of a type not performed by common carriage. The Commission did not require Appellant to establish those factors, although the ability of the common carriers to perform the service was properly considered by the Commission. Appellant implies that it was its duty to establish the inadequacy of existing service and that there was a presumption that the service was adequate absent an affirmative showing to the contrary by Appellant. Neither the Commission nor the Court imposed such a duty on appellant, and, indeed, that presumption was condemned by the Supreme Court in the *J-T* case. However, this does not mean that the Appellant escaped the burden of rebuttal when the protestants presented evidence of their ability and willingness to satisfy the transportation needs of the shipper. In fact, that burden is specifically assigned to applicants by the Supreme Court in the *J-T* case:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to

> show they have the ability as well as the willingness to meet that specialized need. *If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.*" (*I. C. C. v. J-T Transport Co., Inc.*, 368 U. S. 81, at page 90. (Emphasis added.)

The Appellant would have the Court believe that the Commission in reaching its decision indulged in a presumption that the existing services were adequate to meet the transportation requirements of the shipper and thereby assigned the Appellant the improper and impossible burden of proving the inadequacy of the existing service, all in violation of the due process clause. It is apparent that the Commission did no such thing. No mention of a presumption is made. The protestants presented evidence of their ability to service the transportation needs of the shipper, and the Commission's findings refer *to the applicant's failure* to establish anything distinct about the service needed by the shipper from that provided by the protestants. When the protestants presented evidence on these matters, then and at that time the burden shifted to the Appellant to demonstrate that it was better equipped to meet the needs of the shipper than protestants. The Appellant failed to put such evidence into the record.

Appellant in this argument is clearly quarreling with the result of the Commission's exercise of its administrative discretion rather than any substantial federal question. The Commission's decision was not arbitrary and discriminatory, nor did it place upon Appellant an unlawful burden in violation of due process. It does not make adequacy of existing service a conclusive ground for denying applications of carriers who propose to serve one shipper or a limited number of shippers by assigning vehicles to his (their) exclusive use for continuing periods of time. Nor

does it, as Appellant would have, make as a conclusive ground for granting the application, the fact that the Appellant would serve one shipper by assigning vehicles to its exclusive use. No one of the criteria in Section 309(b) is by itself, conclusive grounds for granting or denying an application, and the Commission in this proceeding, as is evident from its orders, considered all five criteria in reaching its ultimate decision.

In its third argument, the Appellant apparently argues that where an applicant is a contract carrier as defined in Section 303(a)(15)(a), it need not meet or satisfy those criteria in Section 309(b) which provide that the Commission in determining whether a permit will issue shall consider "the nature of the service proposed" or "the effect which granting the permit will have upon the services of the protesting carriers." No citation in support of the argument is provided by Appellants and no substantial reason is given why those two particular criteria should be read out of Section 309(b). It obviously is the intent of the section that all five criteria be considered in deciding an application under Section 309(b), regardless of whether the applicant is a contract carrier by virtue of Section 303(a)(15)(a) or Section 303(a)(15)(b). If different criteria were to be applied, certainly some hint to that effect would have been inserted into the statute.

The Appellant's fourth argument to the effect that the Commission and the District Court below erred in manifesting a "special solicitude for that criterion which directs attention to the situation of protesting carriers * * *" is repetitive of prior arguments made in the Statement and is, in reality, an argument based upon its disagreement with the decision rendered by the Commission rather than its manner of reaching it (Statement, pages 4-5). The Commission did not ignore the effect which denying the permit would have upon the Appellant or its shipper. With

respect to the Appellant, the Examiner found, and the Commission adopted that:

> "On the other hand, a denial of the application would have no apparent adverse effect upon applicant, except insofar as it is now handling a limited amount of the traffic under temporary authority, as it would be left in its present position." (Exhibit B, page 32; Exhibit C, page 35.)

While the Examiner did not specifically make a finding as to the effect a denial of the application would have on the shippers, this finding was made by Review Board Number 3 by its Decision and Order (Exhibit C, pages 34-35). The fact that subsequently the Appellant, by its own act, deleted its request to serve one of its two remaining shippers cannot make the Commission's use of the word "shippers" in place of the singular form of any significance. "Shippers" as used by the Review Board obviously included the shipper Hoffman and, therefore, the Commission did consider the fourth criterion under Section 309(b).

The final argument by Appellant attacks the Commission's decision and that of the District Court for failure to properly consider the fifth factor in Section 309(b). As is apparent from Appellant's own argument, the Commission considered the changing character of the shippers' requirements and found that there was none. Appellant's argument under this issue, as with most of the preceding issues, is misplaced. It expresses only disagreement with the conclusions reached by the Commission and the District Court and, therefore, is only relevant to the question of whether there is substantial evidence to support the Commission's finding. It does not raise any substantial federal question and cannot be the basis for any further argument.

The United States Supreme Court has consistently held that orders of the Commission should not be set aside, modified, or disturbed by a court on review, if they lie

within the scope of the Commission's statutory authority, and are based upon adequate findings which are supported by substantial evidence upon the record as a whole, even though the court might have reached a different conclusion on the facts presented. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535-36 (1946); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138-40 (1939); *Mississippi Valley Barge Lines Co.* v. *United States*, 292 U. S. 282, 286-87 (1934); *Interstate Commerce Commission* v. *Union Pacific Railroad*, 22 U. S. 541, 547-48 (1912); *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 454-55 (1907).

In the recent case of *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607 (1966), the Supreme Court at page 619 succinctly defined the role of a court in reviewing a decision of an administrative agency:

> "Section 10(e) of the Administrative Procedure Act (5 U. S. C. Sec. 1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, (or) an abuse of discretion * * * (or) (5) unsupported by substantial * * *.'" Cf. *United States* v. *Interstate Commerce Comm'n.*, 198 F. 2d 958, 963-964, cert. denied, 344 U. S. 893. We have defined 'substantial evidence' as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229. 'It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106; *Keele Hair & Scalp Specialist, Inc.* v. *FTC*, 275 F. 2d 18, 21."

In this proceeding, the Commission's decision is not arbitrary, capricious, unlawful or discriminatory but, rather, is based upon substantial evidence. The District Court, in properly exercising its judicial review role has correctly affirmed the Commission's action. Appellant's Jurisdictional Statement completely fails to present a single substantial question which requires further argument.

WHEREFORE, Appellees herein submit that the decision of the three-judge Federal District Court from which the appeal by Appellant has been taken should be affirmed in all things without plenary consideration.

Respectfully submitted,

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